

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
AND THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM)	NOTICE OF PUBLIC HEARING ON
17.40.318 and the adoption of New Rule)	PROPOSED AMENDMENT AND
I pertaining to state revolving fund and)	ADOPTION
public water and sewer projects eligible)	
for categorical exclusion from MEPA)	(WATER TREATMENT SYSTEMS
review)	AND OPERATORS)
)	(PUBLIC WATER AND SEWAGE
)	SYSTEM REQUIREMENTS)

TO: All Concerned Persons

1. On February 24, 2009, at 1:30 p.m., the Board of Environmental Review and the Department of Environmental Quality will hold a public hearing in Room 111, Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment and adoption of the above-stated rules.

2. The board and department will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact Elois Johnson, Paralegal, no later than 5:00 p.m., February 11, 2009, to advise us of the nature of the accommodation that you need. Please contact Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov.

3. The rule proposed to be amended provides as follows, stricken matter interlined, new matter underlined:

17.40.318 STATE REVOLVING FUND PROJECTS ELIGIBLE FOR CATEGORICAL EXCLUSION FROM ~~EIS REQUIREMENT~~ MEPA REVIEW (1) A ~~Except as provided in (2), a department action on an application for loan assistance under Title 75, chapter 5, part 11, MCA, and this subchapter may receive a categorical exclusion from the requirements of 75-1-201(1)(b)(iii), MCA, and ARM 17.4.626 through 17.4.641, if the department determines under (2) of this rule that its action on the application would not individually, collectively, or cumulatively over time require~~ is excluded from the requirement to prepare an environmental assessment (EA) or environmental impact statement (EIS), and under (3) of this rule that its action is not precluded from a categorical exclusion. if the application for department review is for any of the following projects:

~~(2) Actions consistent with any of the following categories are eligible for the categorical exclusion:~~

~~(a) actions that are solely directed toward projects involving minor rehabilitation of existing facilities, functional replacement of equipment, or~~

construction of new ancillary facilities adjacent or appurtenant to existing facilities. These improvements may not decrease the degree of treatment of the existing facility; and

~~(b) actions for projects in sewerred communities of less than 10,000 persons that involve only minor upgrading or minor expansion of existing treatment works and do not change existing unit processes, and that do not directly or indirectly involve the extension of new collection systems.~~

(a) projects relating to existing infrastructure systems such as sewer systems, drinking water supply systems, and stormwater systems, including combined sewer overflow systems that involve:

(i) minor upgrading;

(ii) minor expansion of system capacity;

(iii) rehabilitation (including functional replacement) of the existing system and system components; or

(iv) construction of new minor ancillary facilities adjacent to or on the same property as existing facilities; or

(b) projects in unsewered communities involving the replacement of existing on-site systems, provided that the new on-site systems do not result in substantial increases in the volume of discharges or in loadings of pollutants from existing sources, and do not relocate existing discharges.

~~(3)~~ (2) A categorical exclusion may not be granted for a department action under (1) if:

(a) remains the same.

(b) the action ~~will~~ would result in an increase above permit levels established for the facility under the Montana pollutant discharge elimination system or Montana ground water pollution control system for either volume of discharge or loading rate of pollutants to receiving waters;

(c) the action would authorize facilities that ~~would~~ will provide capacity to serve a population at least 30% greater than the existing population;

(d) the action is not supported by the state, or other regional growth plan or strategy;

(e) the action directly or indirectly involves or relates to upgrading or extending infrastructure systems primarily for the purposes of future development;

(d) remains the same, but is renumbered (f).

~~(e)~~ (g) the department determines that the proposed project that is the subject of the state action shows some potential for causing a significant effect on the quality of the human environment, based on ARM 17.4.608, or might possibly affect:

(i) and (ii) remain the same.

~~(4)~~ (3) The department shall document its decision to issue a categorical exclusion by referencing the application, providing a brief description of the proposed action, and describing how the action meets the criteria for a categorical exclusion in (1) without violating the criteria for not granting an exclusion in (2).

(5) through (5)(d) remain the same, but are renumbered (4) through (4)(d).

AUTH: 75-5-201, 75-5-1105, MCA

IMP: 75-1-201, 75-5-1105, MCA

REASON: ARM 17.40.318 sets out the criteria under which a wastewater treatment project may qualify for an exclusion from review under the Montana Environmental Policy Act (MEPA). Adopted in 1992, the rule applies to applications to the department, under the Water Pollution Control State Revolving Fund Act, for financial assistance for wastewater treatment projects. The amendments to ARM 17.40.318 are proposed by the board under the Water Quality Act and by the department under the Water Pollution Control State Revolving Fund Act.

The department reviews projects for eligibility for state funding, but has also been approved by EPA to award federal funding for certain projects. The current language in ARM 17.40.318 is based on a federal categorical exclusion under the National Environmental Policy Act (NEPA). The NEPA exclusion, which was promulgated by the U.S. Environmental Protection Agency (EPA), applies to awards of federal funding for wastewater projects. In 2007, EPA modified its NEPA categorical exclusion criteria. The new EPA rule is set out at 40 CFR Section 6.204. The purpose of the proposed amendments to ARM 17.40.318 is to modify the state MEPA exclusion criteria to conform to the new NEPA rule.

The proposed amendments to ARM 17.40.318 do not significantly change the current exclusion criteria. The amendments would restrict the current exclusion to "minor" ancillary facilities, and would expand the current exclusion to include rehabilitation projects that are not "minor". A new provision would prohibit use of the exclusion for upgrades or extensions that are primarily for the purposes of future development. The amendments would also no longer limit the exclusion to communities of less than 10,000 persons. These changes are not substantive with regard to MEPA because the rule continues to require that the department review all projects to determine whether there is potential for significant environmental impacts or significant public interest. See current ARM 17.40.318(4). If that potential exists, MEPA review is required. The other limitations on use of the exclusion also continue to apply (e.g., no new discharge or increase of a discharge above permit levels, or expansion of capacity by 30% or more beyond the existing population).

For projects that apply to the department for federal funding or a combination of state/federal funding, the department's MEPA review must be consistent with NEPA. The amendments to ARM 17.40.318 are necessary to ensure that the department's MEPA categorical exclusion is consistent with the corresponding NEPA exclusion in 40 CFR Section 6.204.

4. The proposed new rule provides as follows:

NEW RULE I PUBLIC WATER AND SEWER PROJECTS ELIGIBLE FOR CATEGORICAL EXCLUSION FROM MEPA REVIEW (1) Except as provided in (2), a department action under this subchapter and under either Title 75, chapter 6, part 1 or Title 75, chapter 6, part 2, MCA, is excluded from the requirement to prepare an environmental assessment or an environmental impact statement if the application for department review is for any of the following projects:

(a) projects relating to existing infrastructure systems such as sewer systems, drinking water supply systems, and stormwater systems, including combined sewer overflow systems that involve:

(i) minor upgrading;

- (ii) minor expansion of system capacity;
 - (iii) rehabilitation (including functional replacement) of the existing system and system components; or
 - (iv) construction of new minor ancillary facilities adjacent to or on the same property as existing facilities; or
 - (b) projects in unsewered communities involving the replacement of existing on-site systems, provided that the new on-site systems do not result in substantial increases in the volume of discharges or in loadings of pollutants from existing sources, and do not relocate existing discharges.
- (2) A categorical exclusion may not be granted for a department action under (1) if:
- (a) the action would authorize facilities that will provide a new discharge or relocate an existing discharge to ground or surface waters;
 - (b) the action would result in an increase above permit levels established for the facility under the Montana pollutant discharge elimination system or Montana ground water pollution control system for either volume of discharge or loading rate of pollutants to receiving waters;
 - (c) the action would authorize facilities that will provide capacity to serve a population at least 30% greater than the existing population;
 - (d) the action is not supported by the state, or other regional growth plan or strategy;
 - (e) the action directly or indirectly involves or relates to upgrading or extending infrastructure systems primarily for the purposes of future development;
 - (f) the department has received information indicating that public controversy exists over the project's potential effects on the quality of the human environment; or
 - (g) the department determines that the proposed project that is the subject of the state action shows some potential for causing a significant effect on the quality of the human environment, based on ARM 17.4.608, or might possibly affect:
 - (i) sensitive environmental or cultural resource areas; or
 - (ii) endangered or threatened species and their critical habitats.
- (3) The department shall document its decision to issue a categorical exclusion by referencing the application, providing a brief description of the proposed action, and describing how the action meets the criteria for a categorical exclusion in (1) without violating the criteria in (2).
- (4) The department may revoke a categorical exclusion if:
- (a) the project is not initiated within the time period specified in the facility plan, or a new or modified application is submitted;
 - (b) the proposed action no longer meets the requirements for a categorical exclusion because of changes in the proposed action;
 - (c) new evidence demonstrates that serious local or environmental issues exist; or
 - (d) state, local, tribal, or federal laws may be violated.

AUTH: 75-6-103, MCA

IMP: 75-6-103, MCA

REASON: The provisions of New Rule I are the same as the proposed

amendments to ARM 17.40.318, except that the New Rule will apply to department review of projects under the state drinking water revolving fund (SRF) program. The drinking water SRF program is administered under Title 75, chapter 6, part 2, MCA. For a summary of the key provisions of the proposed New Rule, see the Reason statement in paragraph 3 above.

Because ARM 17.40.318 is codified in a subchapter that applies only to wastewater SRF projects under Title 75, chapter 5, part 11, MCA, the drinking water categorical exclusion in the New Rule needs to be codified separately. New Rule I will be codified in ARM Title 17, chapter 38, as part of the board's public water and sewer (PWS) rules. The New Rule will apply to drinking water projects reviewed under the drinking water SRF program as well as to non-SRF drinking water and wastewater projects reviewed under the PWS statutes in Title 75 chapter 6, MCA. Unlike the amendments to ARM 17.40.318, which are jointly proposed under separate authorities by the board and the department, New Rule I is proposed by the board under the authority of the PWS statutes.

MEPA review is not necessary for projects that have no significant environmental impacts and when there is no public concern about environmental impacts. A categorical exclusion will allow the department to process applications for these projects without formal MEPA review. EPA has also recommended that, for applications for federal funds, the state drinking water SRF program should adopt a categorical exclusion modeled on the NEPA exclusion in 40 CFR Section 6.204. New Rule I is modeled on the federal rule in order to ensure that the department's MEPA review is consistent with NEPA.

5. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Elois Johnson, Paralegal, Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; or e-mailed to ejohnson@mt.gov, no later than 5:00 p.m., February 26, 2009. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

6. Katherine Orr, attorney for the board, or another attorney for the Agency Legal Services Bureau, has been designated to preside over and conduct the hearing.

7. The board and department maintain a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: air quality; hazardous waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk vehicles; infectious waste; public water supplies; public sewage systems regulation; hard rock (metal) mine reclamation; major facility siting; opencut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wastewater treatment or safe drinking water revolving grants and loans; water quality; CECRA; underground/above ground storage tanks; MEPA; or

general procedural rules other than MEPA. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to Elois Johnson, Paralegal, Department of Environmental Quality, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, e-mailed to Elois Johnson at ejohnson@mt.gov; or may be made by completing a request form at any rules hearing held by the board or department.

8. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

/s/ James M. Madden
JAMES M. MADDEN
Rule Reviewer

BY: /s/ Joseph W. Russell
JOSEPH W. RUSSELL, M.P.H.,
Chairman

DEPARTMENT OF ENVIRONMENTAL
QUALITY

BY: /s/ Richard H. Oppen
RICHARD H. OPPEN, Director

Certified to the Secretary of State, January 20, 2009.